Malayan Banking Bhd v PK Rajamani & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–601 OF 1999

GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ALAUDDIN JJCA

23 NOVEMBER 2002

Land Law — Sale of land — Sale by order of court — Summons served — Adjournment of summons — Notice of adjourned hearing of summons not served — Whether nullity or mere irregularity — Deeming provision — Whether notice sent by court sufficient — Rules of the High Court O 83 r 2(4)

Land Law — Sale of land — Sale by order of court — Setting aside — Delay in making application to set aside — Whether justified — Breach of a rule of court and breach of the rules of natural justice

Land Law — Sale of land — Title of vendor — Second respondent successful bidder at auction — Order for sale void — Whether appellant has the right to give good title

The first respondent is the registered proprietor of certain property. He created a charge over it in the appellant's favour to secure a loan granted to Sira Communications & General Contractors who was the borrower. Such a charge is known to the profession as the 'third party charge'. It is not like a guarantee. It is a proprietary transaction. When the borrower defaulted, the appellant took out proceedings to obtain an order for sale. The summons was duly served on the first respondent. There were some adjournments of the summons. At one of the adjourned hearings the first respondent was absent. The order for sale was then made. It was very much later that the first respondent took out an application to set aside the order for sale. His principal ground of complaint was that the notice of adjourned hearing was not served on him. The High Court set aside the order for sale obtained by the appellant on the ground that the order for sale which was obtained was a nullity because the first respondent had not been served with a notice of the adjourned hearing as required under O 83 r 2(4) of the Rules of the High Court 1980. It is indisputable here that the notice of adjourned hearing was never served on the first respondent. The second respondent was the successful bidder at the auction at which the first respondent's property was sold under hammer. The appellant appealed.

Held, dismissing the appeal:

(1) The facts of the present case is indistinguishable from those of *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374. That decision is plainly binding on this court because of the doctrine of stare decisis. The principle established in that case is that the duty is upon the chargee to serve the notice of hearing of the summons as well as the notice of any adjourned hearing of the summons on the chargor. So here the duty lay upon the appellant. And that duty was never discharged (see para 7).

(2) If the notice was never served by the appellant, then the deeming clause in the annexure to the charge in the instant case, was utterly irrelevant. The deeming provision does not say that the notice sent by the court would be sufficient. Whether such a provision would survive the mandatory requirements of O 83 r 2(4) was a question to be decided in some other case. The critical point here was whether any direction had been issued by the court dispensing with service as provided in the aforesaid rule of court. That notice needless to say was not a direction to the contrary. A direction to the contrary envisaged by O 83 r 2(4) is a specific order by the court hearing the summons made on application by a chargee. Such directions are very rare because foreclosing courts are most alive to the fact that the consequence of their order is to deprive a person of his property (see para 8).

(3) In all cases where service of process was not effected on a defendant the courts had held any judgment or order which was the fruit of those proceedings to be a nullity. It does not matter what type of proceedings they may be. The result is always the same (see para 10).

(4) As for the first respondent's delay in making the application, this was a case in which there has not merely been a breach of a rule of court of mere technical significance. Here there was a breach of the rules of natural justice. The learned judge having accepted the explanation for the delay, the initial function of this court is one of review only. The court does not have an original discretion to exercise. It is only when an appellant has been able to demonstrate a misdirection by the judge in whom the law reposes the original discretion that this court is entitled to intervene. We do not detect any such misdirection in the present case (see para 14).

(5) The second respondent's legal position was very much connected with the appellant's right to give good title. The second respondent cannot be in a better position than the appellants. If the order for sale was void then all that followed in its wake was equally void (*M & J Frozen Foods Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294) (see para 18).

[**Bahasa Malaysia summary**

Responden adalah pemunya berdaftar hartanah. Beliau mempunyai satu gadaian ke atas hartanah itu yang memihak kepada perayu untuk menjamin satu pinjaman kepada Sira Communications & General Contractors, peminjam pinjaman itu. Gadaian begitu dikenali sebagai 'third party charge'. Ia bukan seperti gerenti. Ia adalah satu transaksi hartanah. Apabila peminjam ingkar membayar, perayu telah memulakan prosiding untuk memperolehi satu perintah jualan. Saman itu telah disampaikan ke atas responden pertama. Terdapat beberapa penangguhan kepada saman itu. Semasa satu daripada pendengaran yang ditangguhkan, responden pertama tidak hadir. Perintah jualan telah dibuat pada masa itu. Lama selepas itu, responden pertama telah telah membuat satu permohonan untuk mengenepikan perintah jualan itu.

Alasan utama beliau adalah bahawa notis penangguhan pendengaran itu tidak disampaikan kepada beliau. Mahkamah Tinggi telah mengenepikan perintah jualan yang diperolehi perayu itu sebab perintah jualan itu tidak sah sebab responden pertama tidak disampaikan dengan notis penangguhan pendengaran seperti yang diperuntukkan di bawah A 83 k 2(4) Kaedah-Kaedah Mahkamah Tinggi 1980. Ia tidak dipertikaikan bahwa notis pengangguhan pendengaran itu tidak disampaikan ke atas responden pertama. Responden kedua adalah pembida yang berjaya di mana hartahan responden pertama dijual. Perayu merayu.

Diputuskan, menolak rayuan:

(1) Fakta-fakta kes ini sama seperti *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374. Keputusan itu mengikat makamah ini melalui doktrin stare decisis. Prinsip kes itu adalah ia adalah tanggungjawab pemegang gadaian untuk menyampaikan notis penangguhan pendengaran saman ke atas penggadai. Tanggungjawab itu adalah pada perayu. Dan tanggungjawab itu tidak dilakukan (lihat perenggan 7).

(2) Jika notis itu tidak disampaikan ke atas perayu, klausa anggapan di dalam tambahan kepada gadaian di dalam kes ini tidak relevan. Peruntukan anggapan itu tidak berkata bahawa notis yang disampaikan oleh mahkamah adalah mencukupi. Sama ada peruntukan itu akan mengatasi peruntukan mandatory A 83 k 2(3) adalah persoalan yang perlu dibicarakan di dalam kes lain. Butiran penting di dalam kes ini adalah sama ada terdapat sebarang arahan daripada mahkamah yang menepikan penyampaian seperti yang diperuntukan di dalam kaedah mahkamah. Notis itu bukan merupakan arahan sebaliknya. Arahan sebaliknya seperti yang digambarkan A 83 k 2(4) adalah perintah khusus oleh mahkamah yang mendengar saman itu yang dipohon oleh pemegang gadai. Arahan seperti ini adalah jarang sebab mahkamah yang menutup gadai janji peka kepada fakta bahawa perintah mereka akan merampas hartanah seseorang (lihat perenggan 8).

(3) Di kes-kes di mana penyampaian proses tidak dilakukan ke atas defendan, mahkamah telah memutuskan bahawa sebarang penghakiman atau perintah hasil daripada prosiding itu tidak sah. Ia tidak mengira apa prosiding. Keputusan itu selalu sama (lihat perenggan 10).

(4) Mengenai kelewatan responden pertama di dalam membuat permohonan, di dalam kes ini terdapat perlanggaran kaedah mahkamah yang melebihi kepentingan teknikal. Di sini terdapat perlanggaran kaedah-kaedah keadilan asasi. Hakim yang arif, setelah menerima alasan kelewatan itu, fungsi mahkamah adalah untuk mengkaji semula sahaja. Mahkamah tidak mempunyai bidang kuasa asal. Jika perayu dapat menunjukkan satu salah arahan oleh hakim yang diberi bidang kuasa asal oleh undang-undang, mahkamah dapat bercampur tangan. Di dalam kes ini tiada salah arahan seperti itu (lihat perenggan 14).

(5) Kedudukan undang-undang responden kedua berkait dengan hak perayu untuk memberi hakmilik yang baik. Kedudukan responden kedua tidak dapat melebihi kedudukan perayu-perayu. Jika perintah jualan itu tidak sah maka semua perkara yang mengikutnya juga tidak sah. Ini telah dikatakan oleh autoriti yang tinggi (*M & J Frozen Foods Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294) (lihat perenggan 18).]

Notes

For cases on sale by order of court, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3734–3737.
For cases on title of vendor, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3821–3833.
For order for sale generally, see 8 *Halsbury's Laws of Malaysia*.
For title generally, see 8 *Halsbury's Laws of Malaysia*.

Cases referred to

Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223 (refd)
Leow Boke Chooi v Asia Motor Co Ltd [1967] 2 MLJ 109 (refd)
M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294 (folld)
Muniandy a/l Thamba Kaudan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374 (folld)

Legislation referred to

National Land Code
Rules of the High Court 1980 O 83 r 2(4)

Appeal from: Originating Summons No S6–31–1058 of 1987 (High Court, Kuala Lumpur)

Neoh Poh Cheng (Jacqueline Chang with her) (Suhaimi Khor Zulkifli & Chang) for the appellant.
James Selva (GS Murtti with him) (Ong Kok Bin & Co) for the first respondent.
Balbir Singh (Wan Balbir & Assoc) for the second respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] This appeal is directed at the order of the High Court setting aside an order for sale obtained by the appellant at the adjourned hearing of the originating summons issued for the purpose of foreclosing upon the charge in its favour. Although a number of grounds have been advanced before us it is sufficient to deal with two of them.

[3] The main ground of complaint is that the learned judge went wrong in holding that the order for sale which was obtained was a nullity because the first respondent had not been served with a notice of the adjourned

hearing as required under O 83 r 2(4) of the Rules of the High Court 1980. Now the facts relevant to this ground of complaint may be shortly stated.

[4] The first respondent is the registered proprietor of certain property. He created a charge over it in the appellant's favour to secure a loan granted to Sira Communications & General Contractors who was the borrower. Such a charge is known to the profession as the 'third party charge'. It is not like a guarantee. It is a proprietary transaction. When the borrower defaulted, the appellant took out proceedings to obtain an order for sale. The summons was duly served on the first respondent. There were some adjournments of the summons. At one of the adjourned hearings, the first respondent was absent. The order for sale was then made. Later, in fact very much later; the first respondent took out an application to set aside the order for sale. His principal ground of complaint was that the notice of adjourned hearing was not served on him.

[5] It is common ground — indeed it is indisputable — that the notice of adjourned hearing was never served on the first respondent. The learned judge held this to be fatal. The question is whether he was right. We think that he was.

[6] In *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374, a chargor who had failed to enter an appearance to a foreclosure summons had nevertheless attended court on its return date. The case was postponed and he did not appear on the adjourned date. It was established that the chargee had not served the notice of the adjourned hearing on the chargor. The Federal Court held the order for sale which had been obtained at the adjourned hearing in the absence of the chargor to be a nullity. Edgar Joseph Jr FCJ, a judge of great learning and eminence, dealt with the point of service (at pp 381–382 of the report) as follows:

> Counsel for the chargors had contended that neither of his clients had been served with notice of the adjourned hearing of the originating summons, when the ex parte orders had been made, and as a result, were absent, and that they were thereby deprived of the opportunity of being heard, contrary to the requirements of O 83 r 2(4) the RHC 1980.
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> Counsel for the chargees' answer to this point was that O 83 r 2(4) did not apply to the present case because the relief prayed for by the chargees in their originating summons did not include relief for delivery of possession or payment of moneys secured by the charge.
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> It was pointed out by counsel for the chargees that it was a prerequisite requirement of O 83 r 2(4), imposed by O 83 r 2(1), that the plaintiff must have begun a charge action by originating summons, claiming possession or payment of moneys secured by a charge or both, and that the present case was not such a case. It was accordingly submitted that failure to serve the chargors, or either of them, with notice of the adjourned hearing of the originating summons did not vitiate the ex parte orders.
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> In my view, even if counsel for the chargees were correct in his description of the nature of the reliefs prayed for by the chargees in their originating summons — though, in point of fact, he was not — this would not have relieved the chargees

of their duty to serve notice of the adjourned hearing of the originating summons on the chargors because I consider that O 83 r 2(4) has a common law content. In other words, in my view, O 83 r 2(4) is merely a statutory enunciation of the fundamental rule of natural justice as expressed in the Latin maxim *audi alterem partem* (hear the other side) so that the obligation to serve notice of the adjourned hearing of the originating summons remained even if O 83 r 2(4) did not apply. It is a familiar canon of statutory interpretation that unless a contrary intention appears, an enactment by implication imports the principle of the maxim *audi alteram partem*.

[7] We find the facts of the present case to be indistinguishable from those of *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor*. That decision is plainly binding on us because of the doctrine of stare decisis. The principle established in that case is that the duty is upon the chargee to serve the notice of hearing of the summons as well as the notice of any adjourned hearing of the summons on the chargor. So here the duty lay upon the appellant. And that duty was never discharged.

[8] Learned counsel for the appellant sought to distinguish *Muniandy* on the ground that in the present instant notice had been sent by the court. Itwas also suggested in argument that because of the deeming clause in the annexure to the charge in the instant case, the learned judge had fallen into error. We must be forgiven if we are unable to understand this argument. Ifthe notice was never served by the appellant, then as pointed out by our learned brother Abdul Kadir Sulaiman JCA in the course of argument, the deeming provision is utterly irrelevant. It has no application. Further, we are unable to see the relevance of the deeming provision and its applicability with the notice sent out by the court since that notice does not come within the scope of the deeming provision. In plain words, the deeming provision does not say that the notice sent by the court would be sufficient. Whether such a provision would survive the mandatory requirements of O 83 r 2(4) is a question to be decided in some other case. The critical point here is that contained in the question put by our learned brother Abdul Kadir Sulaiman JCA to counsel for the appellant during argument. It is whether any direction had been issued by the court dispensing with service as provided in the aforesaid rule of court. The appellant counsel's feeble answer to this most important question was to refer us to the notice of hearing issued by the court. That notice needless to say was not a direction to the contrary. A direction to the contrary envisage by O 83 r 2(4) is a specific order by the court hearing the summons made on application by a chargee. Such directions are very rare because foreclosing courts are most alive to the fact that the consequence of their order is to deprive a person of his property.

[9] In our judgment, the judge was entirely correct in applying *Muniandy.* He had no choice in the matter. The fact pattern in that case resembled, as we already said, the facts before him. The principle was established by a court whose decision was plainly binding on him. We therefore agree with the learned judge's conclusion on this part of the case.

[10] Learned counsel for the appellant then raised an alternative point. He sought to argue that the order for sale was a mere irregularity and not a

nullity. We do not agree. In all cases where service of process was not effected on a defendant the courts had held any judgment or order which is the fruit of those proceedings to be a nullity. It does not matter what type of proceedings they may be. The result is always the same.

[11] Thus, in *Leow Boke Chooi v Asia Motor Co Ltd* [1967] 2 MLJ 109, judgment in default had been obtained against the defendant in default of his appearance before a sessions court. The summons could not be served personally on the defendant. The plaintiff had therefore obtained an order for substituted service which required posting copies of the summons and the statement of claim together with the order for substituted service on certain premises in Kuala Terengganu and on the notice board of the court house Kuala Lumpur. The cause papers were posted on the premises at Kuala Terengganu. But they had not been posted on the court's notice board. The sessions court dismissed the application by the defendant to set aside the judgment in default obtained against him. The defendant appealed. Gill J (as he then was) acting in the appellate civil jurisdiction held the judgment to be a nullity and set it aside. This is what he said (at p 110 of the report):

> A point which appeared to have been overlooked by the learned president was that the order of substituted service had not been complied with in that no copies of the summons, the statement of claim and the order were posted on the notice board of the court house in Kuala Lumpur. The effect of such non-compliance with the order was that there had been no good and sufficient service on the defendant, so that the plaintiffs had obtained judgment against the defendant irregularly.
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> In *Anlaby & Ors v Praetorius* [1888] 20 QBD 764 it was held that where a plaintiff has obtained judgment irregularly, the defendant is entitled *ex debito justitiae* to have such judgment set aside. Fry LJ said in that case at p 769:
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> > 'There is a strong distinction between setting aside a judgment for irregularity, in which case the court has no discretion to refuse to set it aside, and setting it aside where the judgment, though regular, has been obtained through some slip or error on the part of the defendant, in which case the court has a discretion to impose terms as a condition of granting the defendant relief.'
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> In *Craig v Kanseen* [1943] 1 All ER 108 it was held that the failure to serve the summons upon which the order in that case was made was not a mere irregularity, but a defect which made the order a nullity, and therefore, the order must be set aside.
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> For the reasons stated I allowed the appeal, setting aside the order of the learned president and substituting in its place an order that the *ex parte* judgment against the defendant be set aside.

[12] So there it is. The order for sale in the present case falls plumb within the authorities we have mentioned. It is void. The learned judge was right. We therefore concluded that the respondent was entitled to have the order for sale set aside *ex debito justitiae*.

[13] That brings us to the second ground of appeal. Learned counsel for the appellant submitted that the learned judge had erred in granting the first respondent's application because he (the first respondent) had been guilty

of long and inordinate delay. Now, the learned judge was very much alive of the point. He referred to *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223, a judgment of this court. He however distinguished the facts of the present instant and accepted the explanation advanced by the first respondent for his delay in making his application.

[14] This is a case in which there has not merely been a breach of a rule of court of mere technical significance. Here there was a breach of the rules of natural justice. The learned judge having accepted the explanation for the delay, the initial function of this court is one of review only. We do not have an original discretion to exercise. We have said so on numerous occasions. It is only when an appellant has been able to demonstrate a misdirection by the judge in whom the law reposes the original discretion that this court is entitled to intervene. We do not detect any such misdirection in the present case.

[15] The first respondent told the judge that he was impecunious and could not therefore afford to engage counsel. The property which is the subject matter of the order for sale is a single storey terrace house in Bangsar. The judge knew that. He was therefore entitled to throw into the balance the fact the first respondent as the owner of such a modest piece of property would indeed have had great difficulty in finding money to engage counsel. He was therefore entirely justified in accepting the first respondent's explanation. The result might have been quite different if the subject matter had been a mansion in Bukit Tunku and the chargor an affluent person.

[16] There is one other matter we need to deal with. In the concluding paragraphs of his judgment, the learned judge made an order awarding damages to the respondents. We invited learned counsel for the first respondent to justify this. He was plainly unable to do so. Having retreated under pressure or argument, he frankly conceded that he could not take the benefit of such an order. Counsel was quite right in making the concession. There is no statutory backing for the order the learned judge made. The National Land Code does not sanction it.

[17] For the reasons already given the appellants' appeal cannot succeed. The upshot is that the appeal is dismissed. But the order of the learned judge as to damages must be set aside. It is. The appellant is of course at liberty to commence fresh proceedings.

[18] That brings us to the position of the second respondent who is the successful bidder at the auction at which the first respondent's property was sold under hammer. In our view the second respondent's legal position is very much connected with the appellant's right to give good title. The second respondent cannot be in a better position than the appellants. If the order for sale was void then all that followed in its wake was equally void. The point has already been concluded by high authority.

[19] In *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 at p 309 Wan Yahya, SCJ when delivering the judgment of the Supreme Court said as follows:

The order for sale confers on the chargee, only the statutory rights to a judicial sale. A sale under ss 256 or 260 of the NLC is a judicial sale ordered by court on the application of the chargee. The chargor, who has until that stage not been divested of his proprietary rights may intervene to set aside the sale in the event of fraud, impropriety or the breach of any statutory or contractual terms of the sale. We agree that the terms or conditions of sale may be varied, if having regard to the interest of both the chargor and the chargee, it is fair to do so; but the sale being a judicial one, has to be done by the court after giving the chargor the right to be heard. Asthe court's power to order the sale, including the authority to fix the price and conditions of sale, is derived from the statutory provisions of the NLC after giving the chargor the right to be heard, it is manifest that any alteration to the term or condition must likewise be exercised.

We consider any variation of the order of sale or the terms and conditions made thereunder in the absence of and without the service of the required notice to the chargor is ultra vires the authority to sell under the National Land Code. Therefore we would, in answer to the second issue raised, say that as the alteration of the completion date was made without giving notice to the chargor, the subsequent order made by the SAR was void as being ultra vires the National Land Code.

The last issue is basically on the authority of the court to cancel the name of the purchaser which had by then become indefeasible by subsequent registration. The registration under ch 4 of Pt XVIII of the NLC does not necessarily make the title of the land entirely unimpeachable. Indefeasibility can be rebutted not only in instances of fraud but also in cases where registration is obtained by the use of an insufficient or void instrument or where the title or interest is unlawfully acquired.

A purchaser of land might fail to obtain a good title in two distinct ways. First, if the title of the vendor is bad. Secondly, even if the vendor has a good title, there might be some invalidating defects in the conveyance or transaction in which the purchaser attempted to obtain the title. These transactions might be void or voidable for a variety of reasons. In the case of a defect in the vendor's title, the common law rule, is that no person can give a better title than he had — nemo dat quod non habet. There are, however, important exceptions to this rule, in particular the qualification made under the proviso to s 340(3) of our National Land Code 1965 where a bona fide purchaser for value without notice of the defeasible nature of the vendor's title acquired an immediate indefeasible title. In the case where the vendor's title is good but the instrument which was used by a purchaser for registration is void or voidable, the effect on such registration will only confer on the person in whose name the land is registered, what is usually referred to as deferred indefeasibility — see *Gibbs v Messer* [1891] AC 248. Under this principle, the registration of the insufficient or void instrument can be set aside.

[20] In a later passage, His Lordship said at p 310:

We agree with what was stated in the judgments above. In our present appeal, failure to comply with the statutory requirements of paras (a) and (b) of s 258 and para (c) of s 261(1) of the NLC is not just a case of non-compliance with some practical guidelines in the Code — a mere irregularity — but it is an illegality which strikes at the root of the proprietor's right to be heard.

[21] The learned judge was therefore equally right in setting aside the order for sale against the second respondent. For these reasons we affirm the judgment appealed against. One final point. There is a cross appeal by the second respondent. It was not seriously canvassed. It is dismissed.

[22] Having heard arguments on costs we are of the view that the appellant should pay costs of both respondents before us. Since the cross appeal came to nothing we would make no order as to costs on it.

Appeal dismissed.

Reported by Sally Kee Seok Meng